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In the

United States Court of Appeals

For the Ninth Circuit

PAUL LESSIG,

Appellant,

vs.

TIDEWATER OIL COMPANY,

Appellee.

Petition of Appellee for Rehearing and Suggestion for Rehearing En Banc Pursuant to Rule 23

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We assign the following grounds for this petition.

1. Final Decision Should Await the Supreme Court in Simpson

Simpson v. Union Oil Company, decided by this Court, 311 F.2d 764, was submitted to the Supreme Court two weeks ago. Simpson's counsel, who is Lessig's, there argued that the decision here is inconsistent with this Court's decision in *Simpson.* A rehearing should be granted so the case may await the Supreme Court's word. The decision here does ignore this Court's decision in *Simpson.* Because a decision of one panel can be overruled only en banc (*Ellis v. Carter,* 291 F.2d 270, 273 (9 Cir.)), we pray a rehearing en banc.

Lessig's claim that "he was unable" to establish his own gasoline prices was made by Simpson, and Lessig's claim that "he was unable" to purchase TBA is similar. And Lessig claims to have lost a service station for the same reason that Simpson did. Yet, the opinion's entire discussion of *Simpson* is that: (a) with respect to the resale price maintenance claim, *Simpson* "may have" relevance (Op. 4, f/n 7); (b) with respect to the TBA claim one should "see" *Simpson* (Op. 15, f/n 28); and (c) with respect to the cancellation claim, *Simpson* "has no bearing". (Op. 4, f/n 7). But in the Supreme Court counsel relied on the decision here as overruling *Simpson* in these respects. In fairness to the bar, the Court should make its views of *Simpson* clear.

2. Appellant's Instruction 18 Is Erroneous

Reversal is ordered for failure to give Lessig's Instruction 18. (Op. 5, 6). Whatever may be said of the first sentence of the instruction, the second* is a flat permission to the jury to award damages on the facts of the case *without the necessity of any finding of wrongdoing, (or even damage†)* a direction of verdict

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*"If you find that Paul Lessig had developed net income and profits at the service station * * * [while there], and there was reasonable likelihood that such earnings and profits would have continued in the future you may award as damages the value of such future profits as of the date of cancellation."

†By permitting the jury to ignore Lessig's subsequent earnings.

for plaintiff as Judge Madden points out. Yet the opinion does not even face this fact. Surely, it commands reconsideration.

3. The Decision's Treatment of Attempts Is Revolutionary

The decision's treatment of "attempt" is revolutionary and stunning. It means that any business man's effort, *however unsuccessful, however hopeless of attainment,* to obtain any share, *however proportionately small,* of the market for a product, *however vast the market,* is an "attempt" "to monopolize" a "part of commerce" and therefore illegal! If so, every businessman of necessity always violates the law, and the most elementary acts of competition are illegal, for the essence of competition is the effort to gain a share of the market. Thus an Act designed to protect competition paralyzes it. Yet the decision's treatment of the subject, opening enormous vistas of liability to all industry, is cursory. So important a departure deserves a hearing en banc.

The decision casts out basic prerequisites of "monopolization" and "attempts". As the reason the law punishes "attempts" is to discourage crimes, there is no sense to punish a mere effort where it is apparent that attainment of the goal would be no crime. Suppose Tidewater actually succeeded *both* in fixing the retail price of its own brand of gasoline in 2700 service stations and in becoming their sole supplier: would it be guilty of monopolizing? True, if it did so by *conspiracy,* it might violate Section 1 of the Sherman Act; or if it did so by tying or exclusive dealing arrangements, it might violate that Section or Section 3 of the Clayton Act. But these elements play no part in the Court's treatment of *this* part of the case.

First, relevant market *cannot* be ignored. In *Brown Shoe,* 370 U.S. 294, where the Supreme Court seized the opportunity to illuminate the whole field, it emphasized (p. 324):

> " '[d]etermination of the relevant market is a *necessary predicate* to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition *"within the area of effective competition.'* " * * *
>
> "The 'area of effective competition' *must be* determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')."

And this was a total endorsement of the discussion in the Report of the Attorney General's National Committee.*

The Court's opinion departs from settled law by holding that the "relevant market" is not relevant to a charge of "attempt to monopolize". This result it reaches by (a) assimilating "attempts" to conspiracies and (b) observing that Section 2 prohibits attempts to monopolize "any part" of commerce, by giving to "any part" the literal sense that *Brown Shoe* rejected. This interpretation of "any part" is in direct conflict with the recent *Rock of Ages Corp. v. H. E. Fletcher Co.,* 1963 Trade Cas. ¶ 70,979, (2 Cir.):

> "Although that section [§ 2] condemns actual *or attempted monopolization* of 'any part of the trade or commerce . . .', it is settled that this means *a market* constituting 'some appreciable part.' "

This Court introduces into "attempts" the discredited concept of "quantitative substantiality" after it has been expelled from the ¶ 3 Clayton Act field (*Tampa Electric,* 365 U.S. 320). The words "any part" are used in the same sentence of the Act relative to "attempts" and "to monopolize". They cannot mean one thing applied to "monopolize" and another when applied to "attempt to". Were this Court's view sound, the elaborate discussion of the relevant market in *U. S. v. Columbia Steel,* 334 U.S. 495 would be pointless.† And the assimilation of "attempt"

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*". . . the concept of 'the market' . . . is integral to the basic concept of 'monopolization,' and the ideas of competition and monopoly on which it rests. Thus, Section 2 . . . deals with monopolizations affecting *markets* which constitute 'any part' of the trade or commerce covered by the Act. To be sure, an appreciable amount of commerce is a 'part' of commerce, but control over an appreciable amount of commerce does not necessarily mean control over an identifiable market which constitutes an appreciable part of commerce." (p. 47).

* * * * * * *

"Sometimes the part of commerce affected by the defendants' conduct will aso be a market; but this does not necessarily follow. *Without a finding as to the market involved, there is no way of determining whether or not the defendants have a given degree of market power.*" (p. 48).

†In footnote 23 to the *DuPont* case the Supreme Court did *not* state the principle attributed to it by the Court at Op. 21. It noted that *Story Parchment* was a conspiracy case and continued:

> "this Court found in *United States v. Columbia Steel Co.,* 334 U.S. 495, that the 'relevant competitive market' for determining whether there had been an unreasonable restraint of trade *(or an attempt to*

to "conspiracy" was shown to be unsound by Justice Holmes in *Hyde v. United States,* 225 U.S. 347, 387:

> "An attempt, in the strictest sense, is an act expected to bring about a substantive wrong by the forces of nature. With it is classed the kindred offence where the act and the natural conditions present or supposed to be present are not enough to do the harm without a further act, but where it is so near to the result that if coupled with an intent to produce that result, the danger is very great. *Swift & Co. v. United States,* 196 U.S. 375, 396. But combination, intention and overt act may all be present *without amounting to a criminal attempt*—as if all that were done should be an agreement to murder a man fifty miles away and the purchase of a pistol for the purpose. There must be dangerous proximity to success. * * * *"On the other hand, the essence of the conspiracy is being combined for an unlawful purpose*—and if an overt act is required, it does not matter how remote the act may be from accomplishing the purpose, if done to effect it;"

This passage also shows the **second** revolutionary aspect of the decision—its rejection, as an essential of an "attempt to monopolize," of the **dangerous probability of success.** Yet, in *American Tobacco Co. v. U. S.,* 328 U.S. 781, 785, 815 an instruction embodying that element was specifically approved. *Swift & Co. v. United States,* 196 U.S. 375, is not to the contrary. Justice Holmes wrote the opinion in *Swift,* and we have quoted his understanding as stated in the later *Hyde* case. See *Attempt to Monopolize: Its Elements and Their Definition,"* 27 Geo. Wash. L. Rev. 227, 230, 233; *Centanni v. T. Smith & Son, Inc.,* 216 F.Supp. 330, 339, affd. per curiam 323 F.2d 363 (5 Cir.); *Mackey v. Sears, Roebuck & Co.,* 237 F.2d 869, 873 (7 Cir.); *McElhenny Co. v. Western Auto Supply Co.,* 269 F.2d 332, 339 (4 Cir.)

Third, one cannot be guilty of monopolizing his own brand. *United States v. E. I. Du Pont De Nemours & Co.,* 351 U.S. 377,

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monopolize) was the market for 'rolled steel' products in an 11-state area." (351 U.S. at 396)

Conspiracy cases are not in point, because "in a charge of conspiracy to monopolize, no act other than the act of conspiring is required to be proved, for the reason that the Sherman Act punishes conspiracies at which it is aimed, on the common law footing." *American Tobacco v. U.S.,* 147 F.2d 93, 111 (6 Cir.); *Attempt to Monopolize,* 27 Geo. Wash. L. Rev. 227, 240.

393. As held in *Nelligan v. Ford Motor Co.,* 262 F.2d 566, 557 (4 Cir. 1959), an *attempt to monopolize* only the market represented by one's own dealers of its own line is not a violation.

4. The Decision States Erroneous Rules Re Proof of Damages

The opinion states that evidence that a merchant has been required to pay more for the "goods which he resells" is evidence that he has been damaged (Op. 15). Even if true of goods of the same make, this statement is not true of goods merely of the same general type. The question is one of common experience, not legal concepts. Ordinarily, the higher the wholesale price of an item the *greater* the profit realized by the retailer.* "Common experience" does *not* "establish with reasonable probability" or even suggest that I. Magnin's profit on the resale of a dress which cost it $100 is less than its profit on a dress which cost it $50 or that one brand of tires will command as high a retail price as another. *Just the opposite is true.*† Further, the opinion errs in saying that Lessig could not produce pertinent evidence because, *arguendo,* Tidewater prevented him from dealing in competitive TBA; testifying that some off-brand batteries were cheaper (Op. 16, f/n 33), he testified that he bought them. (R. 726).

CONCLUSION

We respectfully pray that the petition be granted.

MOSES LASKY
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**Osborne v. Sinclair Refining Co.* involved Firestone and Goodyear, two equally well-known lines customarily selling at the same retail prices. Defendant *agreed* that plaintiff was entitled to recover the difference in wholesale cost, (207 F.Supp. 856, 858), and did not contest this award on appeal (1963 Trade Cases Para. 70,940 at p. 78,744.)

†The opinion states that the "passing on" cases are, "of course," inapplicable. (Op. 15, f/n 30). But why is this so when the very nature of Lessig's retail business was merely to pass on his costs after adding a profit for himself? *Freedman v. Philadelphia Terminals Auction Co.,* 301 F.2d 830, 833 (3 Cir.). The law and the bar deserve an explication if bewilderment is to be avoided.

I certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Moses Lasky